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Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1779

GEORGE D. OWEN,
Petitioner,

v.

THE CITY OF INDEPENDENCE, MISSOURI, *et al.*,
Respondents.

BRIEF FOR NATIONAL EDUCATION ASSOCIATION AND LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AS AMICI CURIAE

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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INTEREST OF THE AMICI CURIAE [1]

The National Education Association (NEA) is the largest teacher organization in the United States, with a membership of approximately 1.7 million educators, virtually all of whom are employed by public educa-

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[1] Consents of all parties to the filing of this brief have been filed with the Clerk.

tional institutions. One of NEA's purposes is to safeguard the constitutional rights of teachers and other public educators.

The Lawyers' Committee for Civil Rights Under Law is a non-profit corporation organized in 1963 at the request of President Kennedy. Its Board of Trustees includes several past presidents of the American Bar Association, two former Attorneys General, and a former Solicitor General of the United States. The Committee's primary mission is to involve private lawyers throughout the country in the quest of all citizens to secure their civil rights through the legal process.

The resolution of this case will have an important impact upon the extent to which those who are injured by the unconstitutional actions of public officials and entities can secure complete relief in the federal courts. Both *amici* have a vital interest in the resolution of this case.

Pursuant to that same interest these *amici* filed a brief in *Monell* v. *Department of Social Services of the City of New York,* 436 U.S. 658 (1978). In *Monell* this Court held that municipalities are "persons" and can be sued directly under § 1983 for monetary relief. The Court left open, however, the question whether municipalities should be afforded any form of qualified immunity in such suits. That question is presented in the instant case, and its resolution will determine whether complete relief is, indeed, available in the federal courts to those who suffer injuries from unconstitutional actions of municipalities.

This brief is filed to provide the Court with the views of the *amici,* refined through extensive litigation under

the Fourteenth Amendment and 42 U.S.C. § 1983, that municipalities do not enjoy any form of immunity from damage liability for violations made actionable by § 1983.

SUMMARY OF ARGUMENT

I. The question here is solely one of statutory interpretation: Did the Congress that enacted § 1983 intend to provide municipalities with some form of immunity against liability for damages in § 1983 suits? Congress intended no such immunity. The words of § 1983—that municipalities "shall be liable to the party injured in an action at law"—are broadly remedial and contain no indication of a congressional intention to adopt an immunity for municipalities. And, Congress knew that the statute would subject municipalities to monetary liability, yet there was not a mention in the entire course of legislative consideration of the bill that municipalities would or should have any immunity in suits under § 1983.

Further, there was no "tradition" of any municipal immunity "so well grounded in history and reason" that the 1871 Congress must be assumed to have *sub silentio* incorporated an immunity into its enactment —indeed, the "tradition" was that wherever municipalities were subject to suit, which by 1871 was a broad range of cases, they had no immunity of any kind. As of 1871, municipalities were subject to suit for every breach of contract, for every violation of constitution or statute (whether state or federal), and for a wide range of torts. In all instances where they were subject to suit, municipalities had no immunity of any kind against damage awards. Particularly pertinent here,

it was well established as of 1871 that enactment of a statute imposing liability on municipalities did not carry with it any implicit damage immunity; whenever municipalities were made subject to damage liability by statute, that liability was enforced without extending any immunity to the municipalities. Congress cannot be assumed to have silently intended that the enactment of § 1983 would carry with it an immunity for municipalities which did not then exist with respect to any other cause of action against municipalities.

II. The court below, and others, without having established the necessary predicate of legislative intent, have nevertheless held that § 1983 provides municipalities a qualified damage immunity, basing their holdings upon one or the other of two distinct rationales. Neither of these rationales furnishes a proper justification for importing any kind of municipal damage immunity into § 1983.

A. There is no basis for "extending" to municipalities the qualified immunity enjoyed by public officials against personal liability. Nothing could be plainer than that as of 1871 the good faith immunity enjoyed by public officials was wholly inapplicable to damage awards against the public treasury. The English courts, which had established the public official immunity doctrine later followed by the American courts, had repeatedly declared the doctrine "inapplicable" to damage awards against the public treasury. The American cases similarly recognized the propriety of awarding damages against municipalities notwithstanding that the wrong was committed in the good faith and reasonable belief that it was lawful.

Further, the reasons which underlie the common-law qualified immunity for public officials in their individ-

ual capacity do not justify a similar immunity for governmental entities. And, twice recently this Court has recognized that fact. *Hutto* v. *Finney,* 437 U.S. 678, 699, n. 32 (1978); *Lake County Estates* v. *Tahoe Regional Planning Agcy.,* 440 U.S. 391, 405 n. 29 (1979).

B. There were two common law doctrines which insulated municipalities from certain types of tort actions altogether, regardless of the relief sought (injunctive or monetary). Neither could have formed a predicate for an unexpressed congressional intent to qualify the damage liability of municipalities in § 1983 actions.

1. The sovereign immunity enjoyed by municipalities at common law with respect to certain of their functions affords no basis for imputing to Congress an unstated intention to limit the amenability of municipalities to damage awards under § 1983. Sovereign immunity was not a damage immunity. Its effect, where it applied, was to insulate the municipality from suit altogether. The doctrine's existence did not reflect a prudential judgment about the desirability of holding municipalities accountable for their torts; rather, it reflected a matter of power—as the sovereign made the law, it could be sued only if and to the extent it chose to subject itself to the law it made. Given the nature of that immunity, it was by definition abrogated by enactment of a statute by the state (or, where, as here, federal power exists, the federal government) subjecting a municipality to suit. Such enactments by states were widespread as of 1871, and their effect was to make municipalities liable in damages without immunity. There is no basis for attributing to Congress a different intention when it made municipalities suable in this statute.

2. There was also at common law a doctrine insulating municipalities from tort suits challenging "discretionary" decisions. This was not an immunity; rather, it defined what constituted a cause of action and what did not. If the law of negligence had been made applicable to every decision of a municipality, then the legislative judgments of the elected officials could have been subjected to judicial review on a claim they were not "reasonable," and judges and juries could thereby have second-guessed and overturned discretionary decisions entrusted to the legislature. To protect against this, the courts carved out those functions which were committed to a governmental entity's legislative "discretion" and made them not subject to suit (for injunctive *or* monetary relief) under the "reasonable man" standard. But the rationale of the "discretionary function" doctrine also defined its limits. Where a municipality was subject to "duties which are absolute and imperative in their nature," there was no protection against injunction or damages for "non-performance or mis-performance." The doctrine is thus by its terms inapplicable to § 1983. Municipalities do not have discretion to violate the federal Constitution. The inquiry under § 1983 is not whether public decisions are "reasonable," but whether they are in violation of the federal Constitution and/or federal statutes. The very purpose of § 1983 was to vest the federal courts with the power to conduct this inquiry. The "discretionary function" doctrine cannot justify a presumption that Congress silently intended to create a qualified immunity for municipalities from damage liability under § 1983.

ARGUMENT

I. CONGRESS DID NOT INTEND MUNICIPALITIES TO HAVE ANY IMMUNITY IN § 1983 SUITS.

In this brief we address only the question whether municipalities [2] have some form of immunity in actions brought against them under 42 U.S.C. § 1983, which was enacted as part of § 1 of the Civil Rights Act of 1871. The question is solely one of statutory interpretation: Did the Congress that enacted § 1983 intend to provide municipalities with some form of immunity against liability for damages in § 1983 suits? As we show below, Congress intended no such immunity. There is no warrant in the language of § 1983 or in its legislative history for finding a congressional intention to establish such an immunity; and, there was no "tradition" of any such immunity "so well grounded in history and reason" [3] that the 1871 Congress must be assumed to have *sub silentio* incorporated an immunity into its enactment—indeed, the "tradition" was that wherever municipalities were subject to suit, which by 1871 was in a broad range of cases, they simply had no immunity of any kind.

The words of § 1983 are broadly remedial and contain no indication of a congressional intention to adopt an immunity for municipalities:

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[2] Throughout this brief, we use the term "municipalities" to include all forms of local government: cities, counties, school districts, etc. This Court drew no distinction between the various forms of local government in *Monell*, concluding that all were embraced within the statutory term "person," 436 U.S. at 690. The analysis we proffer herein likewise would warrant no distinction between them with respect to the immunity question.

[3] *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable to the party injured in an action at law,* suit in equity, or other proper proceeding for redress. [Emphasis added].

The congressional debates which culminated in passage of this provision confirm Congress' intent that these statutory words were to be given their full sweep. The Act's author and manager in the House, Representative Shellabarger, in his speech introducing the bill, explained the breadth of construction which was contemplated—an explanation which was quoted in *Monell* v. *New York City Dept. of Social Services,* 436 U.S. 658, 684 (1978), and bears repeating here:

> This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people. . . . Chief Justice Jay and also Story say:
>
> 'Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally, and it is generally adopted in the interpretation of laws' *Story on Constitution,* sec. 429.

This view of the sweep of the bill was voiced by its sponsors (and acknowledged by its opponents) throughout the debates in passages cited in *Monell,* 436 U.S. at 683-687 and note 45. A repeated theme was that the provision represented the exercise of the entire power which Congress possessed under the Constitution to remedy violations of that Constitution. *Ibid.*

The 1871 Congress made a positive determination to subject municipalities to suits under § 1983. *Id.* at 686, 690. And, that Congress knew that municipalities would be subject to monetary liability in such suits. *Id.* at 690. Yet, there was not a mention in the entire course of legislative consideration of the bill that municipalities would or should have any immunity in suits under § 1983.

The silence of the statute and in the debates on the subject of an immunity for municipalities is of course powerful evidence that none was intended. But congressional intent may sometimes be discerned from other sources. That has proven to be true with respect to the personal immunities which this Court has found are enjoyed by public officials under § 1983. This Court has found that at the time of the enactment of § 1983, the state of the law was that many public officials were immunized, either absolutely or qualifiedly, from personal liability for their official acts. When this Court encountered damage claims against such officials, it was confronted with the question whether the 1871 Congress intended, *sub silentio,* that the existing personal immunities would be applicable in suits under § 1983. The Court recognized that this "immunity ques-

tion involves the construction of a federal statute. . . ." *Wood* v. *Strickland,* 420 U.S. 308, 314 (1975). The question thus was not whether an immunity might make sense as a policy matter, but whether Congress intended its inclusion in § 1983. Where an immunity was well established in 1871 and its rationale compatible with the purposes of § 1983, this Court "presume[d] that Congress would have specifically so provided had it wished to abolish the doctrine." *Pierson* v. *Ray,* 386 U.S. 547, 555 (1967). Using the words of Mr. Justice Frankfurter in the seminal case on this issue, *Tenney* v. *Brandhove,* 341 U.S. 367, 376 (1951), where there was in 1871 a "tradition" of an immunity "so well grounded in history and reason" that "[w]e cannot believe Congress . . . would [have] impinge[d]" upon it by "covert inclusion in the general language [of § 1983]," § 1983 was construed to incorporate that immunity.[4]

The claim that the 1871 Congress must have intended municipalities to have some form of immunity in § 1983 suits has not previously been resolved by this Court. It is our submission that this claim founders on the most basic threshold proposition: there was simply no immunity for municipalities that the 1871 Congress could have assumed it was incorporating in § 1983.

[4] On that basis, the Court in *Tenney* concluded that § 1983 adopted the absolute immunity of legislators as to what they do or say in legislative proceedings. Applying the same analysis, this Court has found § 1983 to provide an absolute immunity for judges, *Pierson v. Ray, supra,* and prosecutors, *Imbler* v. *Pachtman,* 424 U.S. 409, 424 (1976), and a qualified immunity for other categories of public official. *Pierson, supra; Scheuer* v. *Rhodes,* 416 U.S. 232 (1974); *Wood* v. *Strickland, supra; O'Connor* v. *Donaldson,* 422 U.S. 563 (1975); *Procunier* v. *Navarette,* 434 U.S. 555 (1978).

Congress may not be found to have incorporated in its enactment, *sub silentio,* an immunity which did not exist.

As of 1871, municipalities were suable for most of their actions. They were subject to suit for every breach of contract, for every violation of constitution or statute, whether federal or state, and for a wide range of torts.[5] And, in all instances where they were subject

[5] *Federal Constitutional Violations.* The most important provision of the federal Constitution, prior to the Reconstruction Amendments, imposing duties upon municipalities was the Contract Clause. As was observed in *Monell,* 436 U.S. at 681, the federal courts "vigorously enforced the Contract Clause against municipalities—an enforcement effort which included various forms of 'positive' relief, such as ordering that taxes be levied and collected to discharge federal-court judgments, once a constitutional infraction was found." In addition to the cases cited in *Monell, id.* at 673, n. 28, see *Havemeyer* v. *Iowa County,* 3 Wall. (70 U.S.) 294, 303 (1866); *Thompson* v. *County of Lee,* 3 Wall. (70 U.S.) 327, 330 (1866); *Mitchell* v. *City of Burlington,* 4 Wall. (71 U.S.) 270 (1867); *Butz* v. *City of Muscatine,* 8 Wall. (75 U.S.) 575, 584 (1869).

Federal Statutory Violations. Federal patent laws were in effect from 1790 on. Note, *On the Patent Laws,* 4 L.ed. 488. Damage actions against municipalities for infringement of patent were common, and the remedial standards were identical to those applied in suits against private defendants. See, e.g., *Corp. of New York* v. *Ransom,* 23 How. (64 U.S.) 487 (1860); *Bliss* v. *Brooklyn,* 3 Fed. Cases 706 (E.D. N.Y. 1871); *Allen* v. *New York,* 1 Fed. Cases 506 (S.D.N.Y. 1879). We found no other federal statute of broad applicability which imposed duties upon municipalities prior to 1871, and which thus could have produced litigation seeking monetary relief from municipalities. For two narrow federal statutes which led to monetary judgments, see *Roach* v. *Commonwealth,* 2 Dall. (2 U.S.) 206 (Pa.) (judgment against State, prior to adoption of Eleventh Amendment); *Levy Court of Washington County* v. *Woodward,* 2 Wall. (69 U.S.) 501 (1865).

State Constitutions. Most state constitutions contained a provision prohibiting takings without just compensation. These provi-

to suit, regardless of the form of the action, municipalities had no immunity of any kind against damage awards; in all such suits, their liability in damages was

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sions were regularly enforced against municipalities through damage awards. Note, *Right of One Whose Property Has Been Taken for Public Use Without His Consent and Without Condemnation Proceedings to Maintain Action for Compensation or for Permanent Damages*, 28 L.R.A. (N.S.) 968 (1910). During the 1870's, many state constitutions were amended to broaden the "just compensation" principle beyond literal "takings" to property injuries inflicted incidentally (e.g., by regrading the streets so that a merchant's store was no longer accessible to the public). The state courts "have been unanimous in holding that under such constitutional provision a city is liable to [the property owner] for all direct and consequential damage arising from its action in grading or changing the grade of its streets, unless he is compensated under the power of eminent domain before the work is done . . ." Note, *Streets, Change of Grade, Liability of Cities*, 30 Am. St. Rep. 835, 837 (1892) (citing cases).

State Statutes. State statutes imposed many obligations upon municipalities, the violation of which was enforceable by damage action. The statutes authorizing suits for damages for a municipality's failure to prevent a riot, the analogue upon which the Sherman Amendment had been modeled, was much discussed during the debates on § 1983, *Monell*, 436 U.S. at 667-668, n. 17, as was the New York Court of Appeals' 1865 decision rejecting a city's claim that the statute violated the city's right to due process under the state constitution, *Darlington* v. *Mayor of New York*, 31 N.Y. 164 (1865) (see passages cited in *Monell*, at 667-668, n. 17). In some states, the extension of the "just compensation" principle to nontakings was accomplished by state statute, rather than constitutional amendment. Note, *Streets, Change of Grade, supra*, 30 Am. St. Rep. at 848-849. State statutes restricting the grounds for discharging municipal employees, or requiring due process incident to discharge, gave rise to damages in actions denominated "contract" (see below under "Employment Cases"). And, most importantly, state statutes were applied widely to sustain tort damage awards (see below under "Torts", and *infra*, pp. 27-30).

Employment Cases. Claims of wrongful discharge by municipal employees invariably were treated as "contract" actions, and dam-

understood to be identical to that of private corporations and private individuals. There were, to be sure, two common law doctrines which insulated certain mu-

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ages were regularly awarded against municipalities for wrongful discharge. Thus an 1880 treatise stated: "Where [a] teacher is wrongfully dismissed on charge of incompetency or any similar charge, he is entitled to recover from the district his wages for the balance of the term contracted for." Burke, *A Treatise on the Law of Public Schools* 84 (1880). Accord, Bardeen, *Common School Law* 46 (4th ed. 1888); Taylor, *Public School Law of the United States* 295 (1892). Many of these were true "breach of contract" actions. See, e.g., *Mason* v. *School District No. 14*, 20 Vt. 487 (1848); *George* v. *School District No. 8*, 20 Vt. 493 (1848); *Richardson* v. *School District No. 10*, 38 Vt. 602 (1866); *Batchelder* v. *City of Salem*, 58 Mass. 599 (1849); *Trustees of the Town of Milford* v. *Simpson*, 11 Ind. 520 (1858); *City of Crawfordsville* v. *Hayes*, 42 Ind. 200 (1873); *Brown* v. *Rundlett*, 15 N.H. 360, 370 (1844). But many were really actions for violation of statutes requiring due process, or restricting the grounds for discharge, and damages were awarded for such statutory violations under the rubric "breach of contract." See, e.g., *Paul* v. *School District No. 2*, 28 Vt. 575, 578-580 (1856) (statute construed to limit grounds to incompetency or unfaithfulness); *Inhabitants of Searsmont* v. *Farwell*, 3 Maine 450 (1825) (statute limiting grounds); *Shaw* v. *Mayor of Macon*, 19 Ga. 468, 469 (1856) (same); *Jackson* v. *Inhabitants of Hampden*, 16 Maine 184 (1839) (dismissal without adherence to statutory procedures); *School District* v. *McComb*, 18 Colo. 240 (1893) (same); *Ransom* v. *Boston*, 196 Mass. 248, 81 N.E. 998 (1907) (same).

Contract Cases Generally. "Upon authorized contracts," municipalities were "liable in the same manner, and to the same extent, as private corporations or natural persons." Dillon, *Treatise on the Law of Municipal Corporations* 702 (1872). See also Burke, *A Treatise on the Law of Public Schools* 66-67 (1880); *City of Chicago* v. *Greer*, 9 Wall. (76 U.S.) 726 (1870). The most frequently litigated breach of contract actions, at least in federal court, were those for failure to pay interest on municipal bonds. *Commissioners of Knox County* v. *Aspinwall*, 21 How. (62 U.S.) 539 (1859); *Amey* v. *Allegheny County*, 24 How. (65 U.S.) 364 (1861); *Bissell* v. *City of Jeffersonville*, 24 How. (65 U.S.) 287 (1861); *Curtis* v. *County of Butler*, 24 How. (65 U.S.) 435 (1861); *Woods* v. *County*

nicipal functions from suit in tort, for any type of relief (injunctive as well as monetary). We discuss these *infra*, at pp. 25-34, and show that they have

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of Lawrence, 1 Black (66 U.S.) 386 (1862); *Moran* v. *Miami Co.*, 2 Black (67 U.S.) 722 (1863); *Von Hostrup* v. *City of Madison*, 1 Wall. (68 U.S.) 291 (1864); *County of Mercer* v. *Hackett*, 1 Wall. (68 U.S.) 83 (1864); *Seibert* v. *Mayor of Pittsburg*, 1 Wall. (68 U.S.) 272 (1864); *Myer and Stucken* v. *City of Muscatine*, 1 Wall. (68 U.S.) 384 (1864); *County of Sheboygan* v. *Parker*, 3 Wall. (70 U.S.) 93 (1866); *Rogers* v. *City of Burlington*, 3 Wall. (70 U.S.) 93 (1866); *Larned* v. *City of Burlington*, 4 Wall. (71 U.S.) 275 (1867); *Campbell* v. *City of Kenosha*, 5 Wall. (72 U.S.) 194 (1867); *City of Aurora* v. *West*, 7 Wall. (74 U.S.) 82 (1869). A city's plea that execution of judgment would cause it great harm met with this response from the Supreme Court:

> The Counsel for the [city] has called our attention, with emphasis and eloquence, to the diminished resources of the city, and the disproportionate magnitude of its debt. Much as, personally, we may regret such a state of things, we can give no weight to considerations of this character, when placed in the scale as a counterpoise to the contract, the law, the legal rights of the creditor, and our duty to enforce them. Such securities occupy the same ground in this Court as all others which are brought before us. When clothed with legal validity it is our purpose to sustain them, and to give to their holders the benefit of all the remedies to which the law entitles them . . . [W]e cannot recognize a distinction, unknown to the law, between this and any other class of obligations we may be called upon to enforce.

City of Galena v. *Amy*, 5 Wall. (72 U.S.) 705, 710 (1867).

Torts. As explained *infra*, pp. 25-31, the common law divided the functions of municipalities into two categories, "governmental" and "proprietary," and rendered municipalities suable for tort only with respect to their "proprietary" functions (the "governmental" functions being shielded by the state's sovereign immunity). However, as also explained *infra*, pp. 27-30, the states by statute withdrew sovereign immunity with respect to many "governmental" functions, thus giving rise to a body of statutory tort law which was well developed by 1871. Wherever municipalities were suable, they were liable for their negligent acts "on the same principles and to the same extent as a private corporation." Dillon,

no relevance to the construction of § 1983. The point at this juncture is that it was well understood that this common law insulation was overridden by the enactment of a statute making municipalities accountable in court, and such statutes were widespread as of 1871. The enactment of such a statute did not carry with it any implicit damage immunity for municipalities; when municipalities were made subject to statutory liabilities in damages, these liabilities were enforced without extending any immunity to the municipalities.[6] Congress cannot be assumed to have thought that the enactment of § 1983 would carry with it an immunity for municipalities that did not exist under other forms of statutory liability.

Treatise on the Law of Municipal Corporations 33 (1872). Accord: Beach, *Commentaries on the Law of Public Corporations* 265 (1893); Shearman & Redfield, *A Treatise on the Law of Negligence* 139, 149, 159 (1869); *Bailey* v. *Mayor of New York*, 3 Hill 531, 538-539 (N.Y. 1842); *Danbury* v. *Norwalk RR Co.* v. *Town of Norwalk*, 37 Conn. 109, 119 (1870). Similarly, "[i]n regard to the *use* of its corporate property, a municipal corporation [was] bound to an observance of the same rules which the law impose[d] on individuals," and was therefore "responsible, as an individual would be under the same circumstances, for the creation and maintenance of a public nuisance, and [was] liable to a public prosecution, or to a private action at the suit of any one specially injured thereby." Shearman & Redfield, *supra* at 181. See also *Walker* v. *Hallock*, 32 Ind. 239, 244 (1869). And, "the federal courts found no obstacle to awards of damages against municipalities for common-law takings." *Monell*, 436 U.S. at 687, n. 47. For an indication of the enormous volume of tort damage awards which had been rendered against municipalities as of 1871, see generally the cases and materials cited *infra* at pp. 19-20, 27-28.

Execution of Monetary Judgments Against Municipalities. For a comprehensive description of the manner in which federal and state courts achieved execution of monetary judgments against municipalities as of 1871, see *Riggs* v. *Johnson County*, 6 Wall. (73 U.S.) 166 (1868). See also *Monell*, 436 U.S. at 674, n. 30.

[6] See *infra*, pp. 19-20, 27-29.

It is important to understand how we derived certain of the propositions set forth in the preceding paragraph. There were literally thousands of reported cases as of 1871 awarding damages against municipalities for wrongs they were found to have committed. We do not purport to have read all of them. We have read several hundred of those cases and examined contemporaneous treatises discussing thousands more. We did not find a single case in which a municipality was held to have committed an actionable wrong and yet was insulated from paying damages from those injured by that wrong. Indeed, there appear to have been only a handful of cases in which the question of a damage immunity for municipalities was even addressed, and in each it was rejected out of hand.[7] It is always difficult to prove a negative; we cannot say that no case exists in which some court found some municipality immune from damages; we can only say that we could not find one and the treatises do not mention any. But the question here is whether there was a municipal immunity from damages so well established in the law of the time that Congress must have intended to adopt it as part of § 1983. That question can be answered definitively: if there were such an immunity, there would not have been a multitude of cases where municipalities were found to be liable in damages without even asserting the immunity; and, there would not have been uniform rejection of the existence of the immunity in those rare cases we could find where it was asserted.

In § 1983, Congress enacted a statute that declares without qualification that municipalities "shall be liable" to parties injured by violations of federal Con-

[7] See *infra*, pp. 18-20.

stitutional or statutory duties "in an action at law, suit in equity, or other proper proceeding for redress." There is no basis for attributing to Congress an unstated intention to qualify the statutory declaration by conferring upon municipalities an immunity that did not exist elsewhere in the law. Nevertheless, the court below, and others, without having established the necessary predicate of legislative intent, have found it appropriate to adopt such an immunity, based upon one or the other of two distinct rationales. We discuss these rationales separately below, and show the impropriety of adopting an immunity for municipalities based on either.

II. THE ARGUMENTS FOR IMPORTING A MUNICIPAL DAMAGE IMMUNITY INTO § 1983 ARE WITHOUT FOUNDATION.

A. "Extending" To Municipalities The Qualified Immunity Enjoyed By Public Officials Against Personal Liability

The court below chose to "extend the limited immunity [enjoyed by] the individual defendants to cover the City as well," 589 F.2d at 338. No explanation was proffered below for this extension, and nothing could be plainer than that as of 1871 the good faith immunity enjoyed by public officials sued in their individual capacity—an immunity which had evolved out of concern for "the harshness and impolicy of casting on individuals a public duty, and making them responsible out of their private means for the non-fulfillment of it"[8]—was wholly inapplicable to damage awards against the public treasury. The English courts,

[8] Shearman & Redfield, *A Treatise on the Law of Negligence* 209 (1869).

which had established the official immunity doctrine later followed by the American courts,[9] had repeatedly declared the doctrine "inapplicable" to damage awards against the public treasury.[10] As Baron Bramwell explained in *Ruck* v. *Williams,* 3 Hurlst. & N. 308, 319 (1858):

> I can well understand if a person undertakes the office or duty of a Commissioner, and there are no means of indemnifying him against the consequences of a slip, it is reasonable to hold that he should not be responsible for it. I can also understand that, if one of several Commissioners does something not within the scope of his authority, the Commissioners as a body are not liable. But where Commissioners, who are a quasi corporate body, are not affected (i.e. personally) by the result of an action, inasmuch as they are authorized by act of parliament to raise a fund for payment of the damages, on what principle is it that, if an individual member of the public suffers from an act bona fide but erroneously done, he is not to be compensated? It seems to me inconsistent with actual justice, and not warranted by any principle of law.

The American cases similarly recognized the propriety of awarding damages against municipalities notwithstanding that the wrong was committed in the good faith and reasonable belief that it was lawful. The most cited statement of the principle was Chief

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[9] See *Hodgson* v. *Dexter,* 1 Cranch (5 U.S.) 345, 363-364 (1803); *Bradley* v. *Fisher,* 13 Wall. (80 U.S.) 335, 347-353 (1871).

[10] Shearman & Redfield, *supra,* at pp. 208-210, and cases cited in n. 1 thereat.

Justice Shaw's opinion in *Thayer* v. *Boston,* 19 Pick. 511, 515-516 (Mass. 1837):

> There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done, whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful. Still, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damages sustained by an individual, in consequence of the acts thus done. It would be equally injurious to the individual sustaining damage, and to the agents and persons employed by the city government, to leave the party injured no means of redress, except against agents employed, and by what at the time appeared to be competent authority, to do the acts complained of, but which are proved to be unauthorized by law.

Accord: *Town Council of Akron* v. *McComb,* 18 Ohio 229, 230-231 (1849); *Hurley* v. *Town of Texas,* 20 Wis. 665, 669-670 (1866); *Squiers* v. *Village of Neenah,* 24 Wis. 588, 593 (1869); *Lee* v. *Village of Sandy Hill,* 40 N.Y. 442, 448-451 (1869); *Stoddard* v. *Village of Saratoga Springs,* 127 N.Y. 261, 268, 27 N.E. 1030, 1031 (1891); *McGraw* v. *Town of Marion,* 98 Ky. 673, 680-683, 34 S.W. 18 (1896); *Schussler* v. *Board of Commissioners of Hennepin County,* 67 Minn. 412, 70 N.W. 6, 7 (1897); *City of Oklahoma City* v. *Hill Brothers,* 6 Okl. 114, 137-139, 50 P. 242, 249 (1897); *Bunker* v.

City of Hudson, 122 Wis. 43, 54, 99 N.W. 448, 452 (1904).[11]

We have not found a single case, despite extensive research, in which any American court in the Nineteenth Century "extended" to municipalities the immunity for good faith acts enjoyed by officials against individual liability.

While the court below did not attempt to explain its extension of an immunity intended for public officials in their individual capacity to municipalities, that effort was made by a panel of the Tenth Circuit in *Bertot* v. *School District No. 1, Albany County, Wyoming,* Slip. Op. No. 76-1169 (November 15, 1978), vacated pending rehearing *en banc* (1979).

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[11] In addition to the decisions cited in text, which expressly articulated the *Thayer* principle, there were innumerable decisions awarding damages against municipalities for violations expressly found to have been committed in good faith. See e.g., *Page* v. *Hardin,* 8 B. Monroe 648 (Ky. 1844); *Holden* v. *Shrewsbury Sch. Dist. No. 10,* 38 Vt. 529, 532 (1866); *Horton* v. *Inhabitants of Ipswich,* 66 Mass. 488, 489, 492 (Mass. 1853); *Billings* v. *Worcester,* 102 Mass. 329, 332-333 (1869); *Hawks* v. *Inhabitants of Charlemont,* 107 Mass. 414, 417 (1871); *Freeland* v. *City of Muscatine,* 9 Iowa 461, 464 (1859); *Elliot* v. *Concord,* 27 N.H. 204 (1853); *State of Missouri ex rel Cullen* v. *Carr,* 3 Mo. App. 6, 10 (1876); *Weed* v. *Borough of Greenwich,* 45 Conn. 170, 183 (1877); *Woodcock* v. *City of Calais,* 66 Me. 234, 235-236 (1877); and see generally, Note, *Liability of Cities for the Negligence and Other Misconduct of Their Officers and Agents,* 30 Am. St. Rep. 376, 405-411 (1893). Still other cases recognized that the doctrine of official immunity was inapplicable to suits against the municipality, without inquiring further into the existence or non-existence of good faith. *Shaw* v. *Mayor of Macon,* 19 Ga. 468, 469 (1856); *County Commissioners of Anne Arundel County* v. *Duckett,* 20 Md. 468, 481-482 (1863); *Brown* v. *Rundlett,* 15 N.H. 360, 370 (1844); *Morrison* v. *McFarland,* 51 Ind. 206, 210 (1875), citing *City of Crawfordsville* v. *Hays,* 42 Ind. 200 (1873).

This Court in *Scheuer* v. *Rhodes,* 416 U.S., *supra* at 240, and *Wood* v. *Strickland,* 420 U.S., *supra* at 319-320, had spelled out the reasons underlying the common-law qualified immunity for public officials in their individual capacity: (1) that individuals should not be deterred from seeking public office by the risk of *personal* financial exposure; (2) that it would be unfair to subject those who *do* accept public service to personal liability for good faith performance of their office; and (3) that public officers should make decisions on public matters in the *public* interest and should not be rendered timid by the need to weigh on the scales a personal, non-public consideration, i.e., concern for their potential *personal* liability.

The Tenth Circuit panel in *Bertot* found the third of these factors to justify a good faith immunity for the government entity as well as for the individual public officials (slip op. at 5-6):

> The reasons for the application of the doctrine of qualified immunity are as compelling when considering the members individually as they are to the evaluation of the members acting collectively. . . . It is apparent that conscientious board members will be just as concerned that their decisions or actions might create a liability for damages on the board or the local entity as they would on themselves. The restriction on the exercise of independent judgment is the same. The individuals are the same in whatever capacity, their good faith is the same in each capacity whether it is individual good faith, board good faith when considered collectively or official capacity good faith.
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> Qualified immunity should thus be applied to the board as such and to the individuals in their offi-

> cial capacities. . . . The individuals with this qualified immunity conduct the official board business, make the decisions, and carry on the official business. If they have such immunity, there would seem to be no reason why it should not be carried into their collective actions as a board.

The rationale of the *Bertot* court is doubly wrong: it misapprehends the role of a court in construing § 1983; and it misapprehends the rationale for the public official immunity doctrine.

First, as we discussed above, at pp. 7-10, *supra,* the question is not whether immunizing municipalities is a good idea, but whether there is any reason to conclude that Congress intended to establish such an immunity *sub silentio* in § 1983. In the absence of an established body of law recognizing such an immunity in 1871, there is no justification for attributing such an intent to Congress. And as we have shown, the law in 1871 was all to the contrary.

Second, the *Bertot* panel misunderstood the public interest sought to be protected by the third of the reasons listed above underlying the public official immunity. The Court in *Wood, supra,* stated that reason as follows (420 U.S. at 319-320):

> Denying any measure of immunity in these circumstances "would contribute not to principled and fearless decision-making but to intimidation." . . . The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decision-maker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students.

The *Bertot* panel assumed that public officials would be deterred from acting "forcefully" by entity liability as well as by personal liability, and that therefore the reason expressed in *Wood* would equally justify an immunity for the governmental entity—i.e., public officials must be able to act free from the concern that their actions on behalf of the entity might violate the law and thus result in monetary liability for the entity. But the predicate of the statement in *Wood,* and of the common law from which it drew, is that public officials' judgments on the public matters with which they deal should not be clouded by *personal* considerations, i.e. the threat to their own pocketbooks. It hardly follows that they should be equally insulated from considering the impact of their decisions on the treasury of the entity they were elected to serve. Consideration of possible "corporate" liability is appropriate in any decision-making process, and indeed is essential to assuring that governmental entities will comport themselves in a manner consistent with their legal obligations. Constitutional and statutory proscriptions on the conduct of governmental entities are meant to be taken into account and to affect the decisions of those charged with running those entities. The consideration of possible entity liability is a proper public concern and should not be confused with the personal concern raised by the possibility of individual liability.[12]

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[12] See *Johnson* v. *State of California,* 69 Cal.2d 782 (1968), in which the court considered whether "[t]he danger that public employees will be insufficiently zealous in their official duties" might serve as a basis for entity immunity under state laws. Noting that official immunities were developed to protect public employees "from the spectre of extensive *personal* tort liability" (*id.* at 790; emphasis added), the court stated that it did not "deem an employee's concern over the potential liability of his employer, the

Twice recently, this Court has recognized that the considerations underlying the public official immunity do not apply to governmental entities. In *Hutto* v. *Finney*, 437 U.S. 678, 699 n. 32 (1978), the Court, in approving an award of attorney's fees from the state treasury, criticized the dissenters who "would apparently leave the officers to pay the award," because the latter result would:

> . . . def[y] this Court's insistence in a related context that imposing personal liability in the absence of bad faith may cause state officers to "exercise their discretion with undue timidity." *Wood* v. *Strickland*, 420 U.S. 308, 321.

Similarly, in *Lake County Estates* v. *Tahoe Planning Agcy.*, 440 U.S. 391, 405 n. 29 (1979), the Court, while holding individual regional legislators to be immune, stated that "[i]f the respondents have enacted unconstitutional legislation, there is no reason why relief against [the entity] itself should not adequately vindicate petitioners' interests."

B. Extrapolating A Qualified Immunity From The Insulation Which Municipalities Enjoyed From Certain Tort Actions At Common Law

In his concurring opinion in *Monell*, 436 U.S. at 713-714, Mr. Justice Powell noted that one of the questions remaining "for another day" was "whether the protection available at common law for municipal cor-

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governmental unit, a justification for an expansive definition of . . . immune acts." *Id.* at 792. The court "consider[ed] it unlikely that the possibility of governmental liability will be a serious deterrent to the fearless exercise of judgment by the employee," but believed that if such deterrence did occur, it might well be "wholesome." *Id.* at 792.

porations, see post, at 720-721, support[s] a qualified municipal immunity in the context of the § 1983 damages action." The reference was to a passage in Mr. Justice Rehnquist's dissenting opinion noting that "no state court had ever held that municipal corporations were always liable in tort in precisely the same manner as other persons," *id.* at 720-721. The Second Circuit has ruled that this consideration warrants extending to municipalities a qualified good faith immunity from damages for injuries caused by their constitutional violations. *Sala* v. *County of Suffolk*, 604 F.2d 207, 211 (2nd Cir. 1979).

There were, indeed, two common law doctrines which insulated municipalities from certain types of tort actions altogether, regardless of the relief sought, injunctive or damages. We discuss each of those doctrines now, and show that neither could have formed the predicate for an unexpressed congressional intent to qualify the damage liability of municipalities in § 1983 actions.

1. Sovereign Immunity (the Governmental/Proprietary Distinction).

At common law, the doctrine of sovereign immunity insulated state governments from tort actions. When the state delegated certain of its functions to a municipality, the municipality was deemed an "arm of the state." "In chartering a municipal corporation, the state, in fact, charters a portion of itself . . . A municipal organization is only a contrivance to aid the state to administer the laws . . ." Shearman & Redfield, *supra*, at p. 143. With respect to those "governmental" functions the municipality enjoyed the state's sovereign immunity from suit:

> So far as [municipal corporations] exercise powers conferred on them for purposes essentially public—purposes pertaining to the administration of general laws made to enforce the general policy of the state—they should be deemed agencies of the state, and not subject to be sued for any act or omission occurring while in the exercise of such power, unless by statute the action be given. In reference to such matters they should stand as does sovereignty, whose agents they are, subject to be sued only when the State by statute declares they may be.

Beach, Commentaries on the Law of Public Corporations, 266 (1893), quoting *City of Galveston* v. *Posnainsky,* 62 Tex. 118 (1884).[13]

Certain of a municipality's functions, however, were deemed not to have been delegated by the state, but rather to have been voluntarily adopted by the citizens of the municipality. As to these "proprietary" functions, municipalities were treated the same as private corporations:[14]

> [W]ith respect to local or municipal powers proper (as distinguished from those conferred upon the municipality as a mere agent of the state)

[13] Accord: Cooley, *Treatise on the Constitutional Limitations* 240 (1868). The doctrine of sovereign immunity at common law differed in scope, purpose and effect from the immunity extended by the Eleventh Amendment. Thus, while the common-law doctrine applied to some functions of municipalities, "[t]he bar of the Eleventh Amendment to suit in federal courts . . . does not extend to counties and similar municipal corporations." *Mt. Healthy City Board of Ed.* v. *Doyle,* 429 U.S. 274, 280 (1977). See also *Edelman* v. *Jordan,* 415 U.S. 651, 667 n. 12 (1974); *Moor* v. *County of Alameda,* 411 U.S. 693 (1973); *Lincoln County* v. *Luning,* 133 U.S. 529 (1890).

[14] Except in South Carolina, see pp. 28-29 n. 17, *infra.*

> the inhabitants are to be regarded as having been clothed with them at their request and for their peculiar and special advantage and . . . as to such powers and the duties springing out of them, the corporation has a *private* character, and is liable, on the same principles and to the same extent as a private corporation.

Dillon, *Treatise on the Law of Municipal Corporations* 33 (1st ed., 1872).[15]

In reality, by 1871 municipal corporations were far more amenable to suits in tort than the governmental/proprietary distinction would suggest. For sovereign immunity was lost if "by statute the action be given." Beach, *supra,* at 266. During the early and mid-Nineteenth Century, the courts found that as to many "governmental" functions the states had by statute withdrawn the immunity. The process by which this was accomplished is described in Shearman & Redfield, *supra,* pp. 145-153, and in Note, *Liability of Cities for the Negligence and Other Misconduct of Their Officers*

[15] Accord: Cooley, *supra,* at p. 248; Beach, *supra,* at 770. This dichotomy resulted in cities being more generally amenable to tort actions at common law than counties and school districts, for the latter were considered to be exercising delegated "state" powers in most if not all of their activities:

> Counties, townships, school districts, and road districts do not usually possess corporate powers under special charters; but they exist under general laws of the State, which apportion the territory of the State into political divisions for convenience of government, and require of the people residing within those divisions the performance of certain public duties as a part of the machinery of the State. . . . Whether they shall assume those duties or exercise those powers, the political divisions are not allowed the privilege of choice; the legislature assumes this division of the State to be essential in republican government. . . .

Cooley, *supra,* at 240. Accord: Beach, *supra,* at 267.

and Agents, 30 Am. St. Rep. 376, 380-387 (1893). While a minority of the state courts required explicit statutory conferral of a cause of action to lift sovereignty, 30 Am. St. Rep. at 384—rulings which often were followed by the enactment of such explicit statutes, *ibid*—"a decisive majority of the courts in this country, both state and national" ruled that the imposition of a duty upon a municipality by charter or statute "*implies* that redress should be accorded in the courts to anyone injured by its non-performance or mis-performance," *id.* at 385 (emphasis added). By whichever route was followed in a particular state, there developed throughout the nation an entire body of *statutory* tort law: causes of action which could not have been brought at common law were brought pursuant to statute. See, e.g., *City of Providence* v. *Clapp,* 17 How. (58 U.S.), 161, 167-169 (1855); *Weightman* v. *Washington,* 1 Black (66 U.S.) 39, 50-52 (1862); *Nebraska City* v. *Campbell,* 2 Black (67 U.S.) 590, 592 (1862); *Chicago* v. *Robbins,* 2 Black (67 U.S.) 418, 422-425 (1863); *Barnes* v. *District of Columbia,* 91 U.S. 540, 544-552 (1876).[16]

Municipalities thus were broadly amenable to tort actions as of 1871: for their "proprietary" actions they were suable at common law the same as a private corporation, and for their "governmental" actions they were suable to the extent—and it was a considerable extent—that statutory causes of action had been created as described above.[17] And in both contexts—the common

[16] State court cases to the same effect are collected in Note, *supra,* 30 Am. St. Rep. at 380-387.

[17] In his dissenting opinion in *Monell,* 436 U.S. at 721, Mr. Justice Rehnquist cited *Irvine* v. *Town of Greenwood,* 89 S.C. 511

law action for "proprietary" torts, and the statutory action for "governmental" torts—municipalities were found liable in damages in a multitude of cases;[18] our research did not disclose a single case where a municipality was afforded any immunity, qualified or otherwise, from paying damages for injuries resulting from an actionable tort.[19]

The sovereign immunity enjoyed by municipalities at common law affords no basis for imputing to Congress an unstated intention to qualify the amenability

(1911), as reflecting a view that municipalities enjoyed "absolute" tort immunity. In *Irvine,* the South Carolina Supreme Court rejected the "governmental/proprietary" distinction, and held that all functions of municipalities were "governmental." The *Irvine* court acknowledged that its ruling conflicted with decisions of the United States Supreme Court, decisions in other states, and the views expressed in the treatises, and it cited no decision from any other state supporting its position. The effect of its decision, as the court recognized, *id.* at 514, 518, was to render municipalities suable only for statutory torts, i.e., in causes of action which the General Assembly of South Carolina had authorized by statute.

In *Sala,* 604 F.2d, *supra* at 211, the Second Circuit, citing Mr. Justice Rehnquist's dissent, read a *good faith* immunity into § 1983, reasoning that as § 1983 was "enacted by a Congress accustomed to nearly absolute municipal immunity" its statute should not "be read to implement a doctrine of liability without fault." Even if this were not a *non sequitur,* its premise (that Congress was "accustomed to nearly absolute municipal immunity") overlooked both the universal acceptance (outside of South Carolina) of the proprietary functions doctrine and the statutory developments rendering municipalities suable for "governmental" acts.

[18] See sources cited at pp. 19-20, 27-28.

[19] Although not a damage *immunity,* there was a rule of damages applicable with respect to at least some municipal torts that, in order to recover, the "plaintiff [must have] sustained some peculiar damage beyond the rest of the King's subjects" by reason of the tort. *Weightman* v. *Washington,* 1 Black (66 U.S.) 39, 53 (1862), citing *Mayor of Lyme* v. *Henley,* 3 B. & Ad. 77 (1832).

of municipalities to damage awards under § 1983. The doctrine of sovereign immunity was not a damage immunity. Its effect, where it applied, was to insulate the municipality from suit altogether, and thus to preclude the entry of any kind of relief (injunctive as well as monetary) against the municipality. The doctrine's existence did not reflect a prudential judgment about the desirability or undesirability of holding municipalities monetarily accountable for their torts, but, rather, reflected a truth about the nature of power: as the sovereign made the law, it could be sued only if and to the extent it chose to subject itself to the law it made. *Beers v. Arkansas,* 20 How. (61 U.S.) 527, 529 (1858); *Kawananakoa* v. *Polyblank,* 205 U.S. 349, 353 (1907). The law of torts was state law; the state was the sovereign which made that law; and except as the state elected to subject itself (and its "arms," the municipalities) to obedience to that law, and assume accountability in its courts for failure to obey, no action would lie.

Given the nature of that immunity, it was by definition abrogated by enactment of a statute by the state or, where federal power exists, the federal government, subjecting a municipality to liability. The abolition of sovereign immunity through the statutory creation of causes of action was widespread by 1871, and its effect was that municipalities were made subject to damage liability without immunity.[20] With respect to violations of the federal Constitution and federal statutes, Congress was the "sovereign"; the states had no control over the decision of Congress whether their subordi-

[20] See pp. 27-29, *supra.*

nate governmental bodies could be sued.[21] When Congress decided to include municipalities among the "persons" against whom a § 1983 cause of action could be brought, and thus to make municipalities amenable in damages for violating those negative duties imposed by the Fourteenth Amendment, *Monell, supra,* 436 U.S. at 679-680, it rejected *en toto* the sole foundation upon which the common law immunity had rested, i.e. the unavailability of suit. It cannot be presumed that the 1871 Congress intended this imposition of statutory liability to carry with it a municipal immunity from damages when in no other statutory action against municipalities did such an immunity exist.

There is, accordingly, nothing about the common law doctrine of sovereign immunity which justifies imputing to Congress an unstated intention to create a "qualified" immunity for local governmental bodies in § 1983 suits. To impute to Congress such an intention would require assuming that Congress intended, without expressing its intention in the statute or the debates, to create an immunity entirely unknown to the law. The state of the law in 1871 was that entities either were suable or were not, and if suable they had no immunity. Congress made them suable under § 1983, and there is no conceivable basis for imputing to Congress an intention that they should enjoy a qualified immunity.

[21] And the authority which Congress was exercising, that bestowed by the Fourteenth Amendment, was federal authority, not state authority. The laws enacted by Congress during the post-Civil War period were "grounded on the expansion of Congress' powers—with the corresponding diminution of state sovereignty—found to be intended by the Framers and made part of the Constitution upon the states' ratification of [the 13th, 14th and 15th] Amendments." *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, 455-456 (1976).

2. *The Insulation of "Discretionary" Functions From Negligence Suits.*

There was also at common law a doctrine protecting municipalities from tort suits challenging "discretionary" decisions. If the law of negligence had been made applicable to every decision of a municipality, then the legislative judgments of the elected officials could have been subjected to judicial review on a claim that they were not "reasonable". The effect would have been to transfer the ultimate legislative power to judges and juries. To protect against this, the courts fashioned a distinction between those functions which were committed to the governmental entities' legislative "discretion" and those as to which municipalities were under a specific mandate to act (or not to act) in a particular way. The former were not subject to challenge under the "reasonable man" standard. This was not an immunity; rather, it defined what constituted a cause of action and what did not. Its development did not reflect a concern unique to monetary liability; indeed, a principal concern was to protect against injunctions requiring elected officials to alter their legislative judgments:

> The statute may enjoin, absolutely and imperatively, the performance of an act or duty, or it may leave it to the discretion of the corporation either to do it or not to do it. If the latter is the case, courts cannot compel the performance of such duties, or hold the corporation responsible civilly for its refusal to act. A large part of the functions of a city corporation are legislative or governmental, and necessarily a wide discretion is confided to it in determining the means of accomplishing its ends, and the courts will not supervise that discretion. Otherwise, if the courts could by writ of mandamus or other process compel the opening

> and paving of streets, building of sewers, &c., not in conformity with the views of local officers, inextricable confusion in the administration of government would ensue. For the duty of building public works of this kind is one requiring the exercise of deliberation, judgment, and discretion. It admits of a choice of means, and the determination of the order of time in which such improvements shall be made. It involves also a variety of prudential considerations relating to the burdens which may be discreetly imposed at a given time and the preference which one locality has over another.

Shearman & Redfield, *supra,* at 153-154 (footnotes omitted). The vice, as the treatises and cases uniformly recognized, was that maintenance of actions challenging decisions of this type "would transfer to court and jury the discretion which the law vests in the municipality." Beach *supra,* at p. 265; Cooley, *supra,* at pp. 253-255; it would place decision-making "in the judiciary, instead of in the city council, where the Legislature placed it." *City of Little Rock* v. *Willis,* 27 Ark. 572, 577 (1872).[22]

But the rationale of the "discretionary function" doctrine also defined its limits. Where a municipality was subject to "duties which are absolute and imperative in their nature," there was no protection against injunction or damages for "non-performance or misperformance." Shearman & Redfield, *supra,* at p. 159. The doctrine was simply inapplicable "when a specific and clearly defined duty is enjoined." *Weightman* v. *Washington,* 1 Black (66 U.S.), 39, 50 (1862).

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[22] Accord: *Weightman* v. *Washington,* 1 Black (66 U.S.) 39, 49-50 (1862); *Johnston* v. *District of Columbia,* 118 U.S. 19, 20-21 (1886); *Carr* v. *The Northern Liberties,* 35 Penn. State 324, 329-330 (1860).

And thus it is evident that the insulation of municipalities from judicial second-guessing of their "discretionary" decisions is by its terms inapplicable to the duties made actionable in § 1983. Municipalities do not have "discretion" to violate the federal Constitution. The inquiry under § 1983 is not whether public decisions are "reasonable" but whether they are in violation of the federal Constitution and/or federal statutes. It was the very purpose of § 1983 to vest the federal courts with the power to conduct this inquiry. The discretionary function doctrine, having no application to the "absolute and imperative" obligations made actionable in § 1983, cannot justify a presumption that Congress silently intended to create a qualified immunity from damage liability in § 1983.

CONCLUSION

The following propositions, we believe, are dispositive of the issue in this case:

(1) Congress enacted a statute, § 1983, which, without qualification, declared that municipalities "shall be liable to the injured party in an action at law" for their violations of the federal Constitution and federal statutes.

(2) The express congressional purpose was to extend the broadest relief that it was within Congress' power to provide to parties injured by violations of the federal Constitution and statutes made actionable in § 1983.

(3) There is not a hint in the debates that Congress intended to confer any immunity upon municipalities.

(4) The state of the law as of 1871 was that wherever municipalities were made suable they enjoyed no immunity whatever from damage liability.

(5) In particular, the state of the law as of 1871 was that the imposition of a statutory duty upon municipalities carried with it no implicit form of damage immunity.

In the light of these propositions, it would be a distortion of Congressional will to construe § 1983 as conferring any immunity upon municipalities for the violations made actionable by that statute.

Accordingly, the decision below should be reversed.

Respectfully submitted,

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